

APPENDIX A

Order of the Eleventh Circuit Court of Appeals  
Denying Application for Certificate of Appealability

D.E. 17, Civil.

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

OCT 18 2018

David J. Smith  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 18-12124-G

ALAN KENNETH THOMPSON, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court  
for the Middle District of Florida

ORDER:

Alan Thompson, Jr., moves for a certificate of appealability ("COA"), leave to proceed *in forma pauperis* ("IFP"), and leave to file a COA in excess of the page limit, in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. His motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motions for IFP status and leave to file a COA in excess of the page limit are DENIED AS MOOT.

/s/ William H. Pryor Jr.  
UNITED STATES CIRCUIT JUDGE

APPENDIX A

APPENDIX B

I. Order of the District Court Denying Motion to  
Vacate, Set Aside or Correct Sentence

D.E. 4, Civil.

II. Order of the District Court Denying Application  
for Certificate of Appealability

D.E. 11, Civil.

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

ALAN KENNETH THOMPSON, JR.,

Petitioner,

-vs-

Case No. 5:18-cv-149-Oc-10PRL  
Criminal Case: 5:15-cr-52-Oc-10PRL

UNITED STATES OF AMERICA,

Respondent.

**ORDER**

This is a proceeding under 28 U.S.C. § 2255 initiated by a federal prisoner (Thompson) acting pro se. He seeks to set aside his conviction and sentence, alleging two grounds for relief: (1) ineffective assistance of his trial counsel; and (2) ineffective assistance of his appellate counsel.

The record conclusively shows that the petition is meritless. No response from the Government is necessary, and no evidentiary hearing is required. The motion/petition under 28 U.S.C. § 2255 will be denied with prejudice.

**Discussion**

Thompson was indicted on October 21, 2015 (Doc. 12, Criminal Case). He was charged in two counts:

Count One alleged that between May 5 and May 11, 2015, in the Middle District of Florida, Thompson knowingly distributed in

interstate commerce by computer, material containing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1).

Count Two alleged that on September 10, 2015, in the Middle District of Florida, Thompson knowingly possessed images of child pornography that had been shipped in interstate commerce by computer in violation of 2252A(a)(5)(B).

On January 27, 2016, Thompson entered into a plea agreement with the United States (Doc. 22, Criminal Case) whereby he entered a plea of guilty to Count One, with Count Two to be dismissed.

At sentencing on May 25, 2016, the Court adopted the calculations of the Presentence Report and found that the Guidelines sentencing range was 168 to 210 months – the range applicable to Offense Level 34, Criminal History Category II, with a statutory mandatory minimum term of 60 months (Doc. 55, pp. 9-11.) However, the Government had filed a motion for downward departure pursuant to § 5K1 of the Guidelines (Doc. 39, Criminal Case), suggesting a reduction of three Offense Levels in Thompson's Sentencing Guidelines calculation. The Court granted that motion and determined that the resulting Guidelines sentencing range was 121 to 151 months at Offense Level 31, Criminal History Category II. (Doc. 55, pp. 11-12.) The Court then imposed a mid-range sentence of 136 months followed by 10 years of supervised release, and judgment was entered accordingly. (Doc. 44.)

Thompson prosecuted a timely appeal, but in due course his lawyer filed an Anders brief and sought leave to withdraw. The Court of Appeals granted that motion and affirmed the conviction and sentence (Doc. 60, Criminal Case) after observing that

its "independent review of the entire record reveals that counsel's assessment of the relative merit of the appeal is correct." (*Id.*)<sup>1</sup>

Thompson then timely filed his pending motion under 28 U.S.C. § 2255 presenting two claims of ineffective assistance of counsel.

A. The first claim is that trial counsel was ineffective because he did not challenge the sufficiency of the indictment, arguing that there was a variance between the statute and the allegations of the indictment and/or a variance between the indictment (or perhaps the statute) and the elements of the offense as enumerated in the Plea Agreement. Thompson is simply wrong.

The indictment plainly and clearly alleged in Count One that the Defendant "did knowingly distribute material that contained child pornography . . . which had been shipped and transported in . . . interstate . . . commerce . . . by computer, and using . . . the internet." (Doc. 12, Criminal Case). Count One concluded by charging that the alleged conduct constituted a violation of 18 U.S.C. § 2252A(a)(2)(B) and the penalty provision of (b)(1).

The statute says:

(a) Any person who –

xxxx

(2) knowingly receives or distributes –

xxxx

(B) any material that contains child pornography that has . . . using any means . . . of interstate . . . commerce . . . shipped or

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<sup>1</sup> The Supreme Court denied certiorari. (Doc. 62, Criminal Case).

transported in or affecting interstate commerce . . . including by computer;  
xxxx  
shall be punished as provided in subsection (b).

The elements of the offense as correctly enumerated in the Plea Agreement (Doc. 22, p. 2) were:

- First: The Defendant knowingly distributed an item of child pornography;
- Second: The item of child pornography had been transported in interstate or foreign commerce, including by computer; and
- Third: When the Defendant distributed the item of child pornography, he believed the item was child pornography.

There was simply no insufficiency, variance, inconsistency or other discrepancy of any kind in or between any of the relevant documents; and, consequently, there was no ineffective assistance by counsel concerning the matter.

Additionally, Thompson cannot demonstrate any prejudice. He walked into his sentencing hearing facing a Guidelines sentence of as much as 210 months – the high end of the applicable sentencing range. He left the courtroom with a sentence of 136 months, ~~over six years less than he might have received, and~~ 32 months below the Guidelines' minimum of 168 months. For Thompson to suggest now that his lawyer should have challenged the indictment concerning an easily correctable flaw – assuming one existed – and expose him to a much more severe sentence is utterly without credibility. In fact, it is hard to understand the filing of the present motion which would almost certainly lead to a disaster for Thompson if his motion should be granted.

His lenient sentence would be set aside; his plea agreement would be repudiated; the Government could correct the procedural flaw if, in fact, one existed; and Thompson would be looking at a minimum Guidelines' sentence of 168 months while defending what would appear to be a hopeless case for him. As it is wisely said: One should be careful about what one asks for.

B. The claim of ineffective assistance by appellate counsel is even weaker. Here the Court of Appeals, by its own declaration, conducted an "independent review of the record [and concluded that] counsel's assessment of the relative merit of the appeal is correct." Thus, any finding by this Court that Thompson's appellate counsel was deficient in some way would be, by the same stroke, a finding that the Court of Appeals was equally deficient. While the business of the Court of Appeals is to find errors committed by this Court, a job it performs with great skill, I have never understood that it is the business of this Court to review the decisions of the Court of Appeals in hopeless searches for error, and I don't intend to start now.

Any claims or contentions made by Thompson that are not expressly identified in this order have been considered and rejected.

The motion/petition under 28 U.S.C. § 2255 is **DENIED with prejudice** and the Clerk is directed to enter judgment to that effect and close the file.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 2nd day of May, 2018.

*W. Russell Holguin*

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record  
Mari Jo Taylor, Courtroom Deputy  
Alan Kenneth Thompson Jr.

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

ALAN KENNETH THOMPSON JR.,

Petitioner,

-vs-

Case No. 5:18-cv-149-Oc-10PRL  
5:15-cr-52-Oc-10PRL

UNITED STATES OF AMERICA,

Respondent.

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**ORDER**

On May 2, 2018, the Court denied the Defendant/Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. 4.) Judgment was entered May 4, 2018. (Doc. 5.) Petitioner has filed a Notice of Appeal (Doc. 6), also construed by the Clerk as a Motion for a Certificate of Appealability (Doc. 7), and a motion for leave to appeal *in forma pauperis* (Doc. 10).

Pursuant to Federal Rule of Appellate Procedure 22(b)(1), the Court must either issue a certificate of appealability or state why a certificate should not issue. Section 2253(c)(2) permits issuing a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 474 (2000). If a motion to vacate is denied on procedural grounds, the

petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Upon due consideration, and for the reasons stated in the Court's May 2, 2018 Order, the Court finds that Petitioner has not made the requisite showing and is not entitled to a certificate of appealability. Accordingly, the Defendant/Petitioner's Motion for Certificate of Appealability (Doc. 7) and Motion to Appeal *In Forma Pauperis* (Doc. 10), are both DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 3rd day of July, 2018.

*W. Kenneth Hodges*

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record  
Mari Jo Taylor  
Alan Kenneth Thompson, Jr.

**APPENDIX C**

**Order of the Eleventh Circuit Court of Appeals**

**Denying Petition for Rehearing**

**D.E. 18, Civil**

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

JAN 02 2019

David J. Smith  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 18-12124-G

ALAN KENNETH THOMPSON, JR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court  
for the Middle District of Florida

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Alan Thompson, Jr. has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's October 18, 2018, order deny him a certificate of appealability ("COA"), leave to proceed *in forma pauperis*, and leave to file his COA in excess of the page limit. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

APPENDIX C

**APPENDIX D**

**Order of the District Court Denying Petition in  
Support of Rule 59(e) for Reconsideration**

**D.E. 13, Civil**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

ALAN KENNETH THOMPSON JR.,

Petitioner,

-vs-

Case No. 5:18-cv-149-Oc-10PRL  
5:15-cr-52-Oc-10PRL

UNITED STATES OF AMERICA,

Respondent.

O R D E R

On May 2, 2018, the Court denied the Defendant/Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. 4.) Judgment was entered May 4, 2018. (Doc. 5.) Petitioner filed a Notice of Appeal (Doc. 6),<sup>1</sup> which was executed on May 14, 2018. On May 26, 2018, Petitioner executed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.<sup>2</sup>

Petitioner's Rule 59(e) motion is timely, as it was filed on May 26, 2018, within the 28-day period following entry of judgment (June 1, 2018). Fed. R. Civ. P.

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<sup>1</sup> Petitioner's (construed) motion for certificate appealability and his motion for leave to proceed *in forma pauperis* have been denied. (Docs. 7, 10, 11.)

<sup>2</sup> Applying the "mailbox rule" of Houston v. Lack, 487 U.S. 266 (1988), the motion is deemed "filed" when a *pro se* prisoner delivers it to a prison official for mailing.

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59(e). The filing of a notice of appeal typically divests the District Court of jurisdiction to take any action except in the aid of the appeal. See United States v. Tovar-Rico, 61 F.3d 1529, 1532 (11th Cir. 1995). However, a "premature notice of appeal does not divest the district court of jurisdiction to rule upon a timely-filed Rule 59(e) motion." Williams v. Pettiford, 238 Fed. Appx. 459, 461 (11th Cir. 2007) (citing Gibbs v. Maxwell House, Div. Of Gen. Foods Corp., 701 F. 2d 145, 147 (11th Cir. 1983)); see also Fed. R. App. P. 4(a)(4)(B)(i).

Upon due consideration, Petitioner's motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) (Docs. 9,12) are DENIED. Petitioner has failed to put forth newly discovered evidence or manifest errors of law or fact to warrant reconsideration of the judgment. Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.") (internal quotations, citations, and alterations omitted).

IT IS SO ORDERED.

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DONE and ORDERED at Ocala, Florida this 6<sup>th</sup> day of August, 2018.

*W. Kenneth Holguin*

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record  
Mari Jo Taylor  
Alan Kenneth Thompson, Jr.

**Additional material  
from this filing is  
available in the  
Clerk's Office.**